THE FUNCTION OF THE JUDICIARY.[1]

II.

That grants of power in a constitution are not to be construed by the same rules as powers of attorney or trust deeds is one illustration of the principle that, while the rules of private law are full of suggestion in the examination of analogous situations in public law, it is in their suggestion that they are valuable, and not because they can be transferred as binding rules from the one department of law to the other. It is necessary, then, to seek elsewhere than in the private law doctrines of agency and trust deeds for the principles that are to guide us in interpreting the grants of power in the Constitution of the United States; and if we do so, we find one of them in the decision of *Julliard* v. *Greenman*[2] that, subject to the prohibitions of the Constitution, the powers granted in the United States Constitution are to be interpreted in the light of the practice of civilized nations. Probably the best application of this principle is to be found in the famous Insular Cases.

Those cases held that the United States could hold colonies—that is, dependencies distinct from and not incorporated in the body politic of the United States. No such power is expressly granted in the Constitution, but long before this it had become a well-settled principle of constitutional law that under the power to make treaties and to carry on war, the United States had the right to acquire territory and to govern it. The point of difficulty was as to whether in governing territory thus acquired the United States could treat it as distinct and apart from itself, or must treat it as territory ultimately entitled to statehood, as almost all the territory previously acquired had been treated. If the United States could not treat it as distinct from itself, the only way in which the American nation could help in the work of spreading civilization among those peoples of the earth, who are unsuited by geographical conditions or historical antecedents from becoming integral parts of the United States, would be through the establishment of protectorates such as the Supreme Court had already refused to interfere with in the case of Cuba.[3]

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[1] Part I appeared in VII COLUMBIA LAW REVIEW 337.

[2] (1884) 110 U. S. 421. [3] Neely *v.* Henkel (1900) 180 U. S. 109.

The situation, then, reduced itself to this: The United States had the power to acquire by treaty and govern territory. Viewed in the light of the practice of civilized nations, did this power include the power to hold colonies? If so, was this prohibited by the Constitution? To the first question there could be but one answer. The most highly civilized nations in all time have held colonies. If they had not, it is hard to see how civilization could be so widespread as it is at present; and if the practice should be abandoned, it is hard to see how civilization is to become world-wide in the future. It is apparently one of the necessary instruments in the extension of the reign of law. To the second question the answer is not so easy. While there are no express prohibitions in the Constitution against the holding of colonies, the Supreme Court has always held that there are certain fundamental principles underlying all free governments, and especially our own, which, although not clothed in express language, breathe through the provisions of the Constitution and are the conditions of its very existence. It seems to the writer that it was on the question as to whether one of these fundamental principles of our own American life should be enforced by the judiciary or not, that the decision in the Insular Cases turned. The situation was a new one for the Supreme Court and was not to be decided by the chance remarks of previous judges in situations essentially different.

In his dissenting opinion in *Downes* v. *Bidwell*, Chief Justice Fuller said that the theory of the majority "substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power." [4] Similarly Justice Harlan wrote: "The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius, as well as with the words of the Constitution." [5]

The idea that territory could be held for an indefinite period without a great part of the express guarantees of the Constitution, and most of all without the prospect of the full political life of statehood, seemed to the dissenting justices to run counter to the principles that had characterized American political life from its very beginning. That taxation without representation is

[4] (1900) 182 U. S. at 373. [5] (1900) 182 U. S. at 380.

tyranny had been the rallying cry of the revolutionary fathers, and to the dissenting justices it seemed unlikely that the constitutional fathers could have so soon forgotten the lesson of the revolution as to make it possible under the Constitution to hold distant dependencies without the ultimate prospect of full representation in Congress. A permanent imperial system seemed so inconsistent with American republican ideas that they felt it incumbent on the judiciary to make such a system once and for all impossible.

This inconsistency was not unperceived by the majority. Where they differed from the minority was in placing the responsibility of the departure from the old ideas, if departure there should be, entirely on the political departments. To them it was a political question and not one of constitutional law. Justice White said: "Whilst no particular provision of the Constitution is referred to, to sustain the argument that it is impossible to acquire territory by treaty without immediate and absolute incorporation, it is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States, and which are not so completely incorporated as to be in all respects part of the United States; that the theory upon which the Constitution proceeds is that of confederated and independent states, and that no territory, therefore, can be acquired which does not contemplate statehood, and excludes the acquisition of any territory which is not in a position to be treated as an integral part of the United States. But this reasoning is based on political, and not judicial considerations. Conceding that the conception upon which the Constitution proceeds is that no territory, as a general rule, should be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is wholly a political question, and the aid of the judiciary cannot be involved to usurp political discretion in order to save the Constitution from imaginary or even real dangers. The Constitution may not be saved by destroying the fundamental limitations." [6]

The point on which the case turned, therefore, was as to which was to be the guardian of the old American principle that a people can determine their own interests better than some one else for them. The fundamental character of this principle in American life made the decision as to whether it should become a principle of constitutional law as well, of the most vital importance in deter-

[6] (1900) 182 U. S. at 311.

mining the nature of the unwritten prohibitions which the courts are to place on the exercise of power by the political departments. Who can question that if the Supreme Court had taken the position of the dissenting justices in the time of Thomas Jefferson that he would have considered it a usurpation of political power? But it does not seem likely that the court of which Chief Justice Marshall was the chief ornament would have taken such a position. It is a pleasure to note that the political departments have not been found wanting in the trust that was left with them, but have started on the path of preparing the Philippines for the responsibilities and privileges of ultimate independent government. This brings us to the more special consideration of the third proposition laid down in *Julliard* v. *Greenman* that political questions should be left to the political departments.

It can never properly be lost sight of that it is the function of the Legislature to make the laws, of the executive to enforce them and of the judiciary to decide cases coming under them. But in its decision of cases the judiciary has made much law and it is necessary to indicate in a general way when this law-making is political and when properly judicial. Political questions *par excellence* are those which are the subject of political controversy. The most important of these have been constitutional, but, to take our own country, hardly less important have been questions of tariff, of currency and of the regulation of commerce. If the law on these questions is to be judge-made, then, if we are to have representative government, the judges must be made responsible to the electors and, in order to accomplish this, given short terms. But short terms would be fatal to that law-making function which is properly theirs.

No one who has ever given careful attention to the decisions of the English courts can help being struck by the profound grasp of principle and the freedom of handling decided cases which mark them. They exhibit the common law as a living thing, capable of adaptation to new conditions and yet sufficiently vitalized by principle to constitute a true legal system. This grasp of principle, if not altogether lacking, is much less characteristic of our own courts. Decided departures from precedent are not lacking, but too often they are based on a rule of thumb, which works sufficiently well for the case in hand but is not sufficiently broad to be of much help for the future. As a result the tendency of our law is to become an agglomeration of an infinite number of rules of thumb or,

on the other hand, as Lincoln once said, the last guess of the Supreme Court.

There are many reasons for this. Perhaps the most important is that we have at least as many independent jurisdictions as we have states, while in England there is but one jurisdiction. Cases in point are cited from other states based on premises logically inconsistent with much of the law on the same subject in the state where they are cited and yet are followed, due to the terrible dominance of the decided case. History is perhaps but repeating itself. The strong national life of England allowed her to develop a vital system of law while the local courts on the Continent were developing merely bodies of custom, which were prevented by their lack of broad principle from becoming true legal systems.

If history is not to repeat itself, it will only be because we make the most of those factors which our judges may have in common with those of England—that is, long judicial terms and the separation of politics from the law. Law itself is such an all-embracing field that fortunate indeed is he who masters it. Native ability and responsible experience in other lines are inadequate to produce a great judge. Long judicial experience is also necessary and this is possible only through long judicial terms. But as already pointed out, these are impossible if judges are to use the freedom in making constitutional and public law generally that is so desirable in private law. The terms of many of our judges are too short already and yet agitation is not wanting to still further shorten them.

This agitation, however, has been caused even more by the alleged assumption of executive power by the judiciary than by any claims of their encroachment on the legislature. In *In re Debs*[7] the Supreme Court in approving the grant of an injunction against strikers chose to base its decision not only on the ground that property was threatened, but also that it was competent for the executive to invoke the aid of the judiciary to remove or restrain all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail.

In the course of his opinion in that case, Justice Brewer had occasion to notice the argument of counsel that the grant of the injunction in this case was the assumption of essentially executive and military power by the courts of chancery and in reply said: "It may be true, as suggested, that in the excitement of passion a mob will pay little heed to processes issued from the courts, and

[7] (1894) 158 U. S. at 564.

it may be, as said by counsel in argument, that it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late civil war. It is doubtless true that *inter arme leges silent,* and in the throes of rebellion or revolution the processes of civil courts are of little avail, for the power of the courts rests on the general support of the people and their recognition of the fact that peaceful remedies are the true resort for the correction of wrongs. But does not counsel's argument imply too much? Is it to be assumed that these defendants were conducting a rebellion or inaugurating a revolution, and that they and their associates were thus placing themselves beyond the reach of the civil process of the courts?" [8] Too much weight must not be given this argument *ad hominem,* but as far as general principle can be drawn from, it would seem to be that the executive may call on the judiciary in the enforcement of law and order as long as the disturbance does not amount to an insurrection. The incorporation of this principle into our law would be a wide departure from precedent, and even more so from the point of view of the individual's right to a jury trial than from that of the assumption of the executive function of the enforcement of law and order. It is unfortunate that Justice Brewer felt called upon to give expression to it as the facts of the case allowed it to be decided as it was, without substantial departure from judicial precedent.

Perhaps the most widespread application of the principle that the judiciary is to leave to the executive the enforcement of the law is that formulated in *Martin* v. *Mott,* that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." [9] If the courts could review acts of discretion, whether political or, more properly, administrative, the independence of the departments would be a mere name.

The principle that it is the function of the judiciary to decide cases finds illustration in two well-settled rules, that it is not their function to give opinions on questions of law to the political departments, nor to interfere with the enforcement of laws merely because they are unconstitutional. The giving of advice is clearly incidental to the action to be taken on the advice. If the action is political the giving of advice with regard to it is political also. The second of these rules was emphasized in the case of the *State of Georgia* v.

[8] (1894) 158 U. S. at 597. [9] (1827) 12 Wheaton 31.

Stanton.[10] In that case the State of Georgia sought to prevent Secretary Stanton from enforcing the Reconstruction Acts on the ground that they were unconstitutional. Justice Nelson in delivering the opinion of the Court said:

"In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain Acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State Government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would be maintained. * * * That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court." [11]

Finally, in order to make a proper case, the court must have jurisdiction over the party against whom the relief is sought. The courts have no jurisdiction over the sovereign which has created them except in so far as it shall have assumed the character of a private individual. It may be sued with its own consent, but beyond this, relief against it must be brought through political and not judicial channels. Nor have the courts jurisdiction over foreign sovereignties. Relief against them and against their diplomatic agents must be sought through diplomacy, and questions which it is incumbent on the political departments in either of these cases to decide are not to be reviewed by the courts, even though they come before them in ordinary judicial proceedings. Since the eleventh amendment this principle has, in general, been extended to the States of the Union, and the Supreme Court "has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent

[10] (1867) 6 Wallace 50. [11] (1867) 6 Wallace at 76.

nations, could not have been enforced judicially, but only through the political departments of their governments."[12]

The same principles apply between the departments themselves. "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interferences will be clearly seen upon consideration of their possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the Acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves." [13]

This article may fittingly be closed with the following words of Justice Woodbury in that part of his opinion in *Luther* v. *Borden*, in which he concurred with the majority of the court: "The disputed rights beneath constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are *per se* questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights—not what is *meum* and *tuum*—but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russel for them ever to entrust their final decision when disputed to a class of men who are so far removed from them as the judiciary, a class, also, who might decide them erroneously as well as right, and if in the former way, the consequences might not be

[12] Wisconsin *v.* Pelican Ins. Co. (1887) 127 U. S. 288.

[13] State of Mississippi *v.* Johnson (1866), 4 Wallace at 500.

able to be averted except by a revolution, while a wrong decision by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the Constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by, nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way, slowly, but surely, a new sovereign power, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of time. * * * So the judiciary, by its mode of appointment, long duration in office, and slight accountability, is rather fitted to check legislative power than political, and enforce what the political authorities have manifestly ordained. These last authorities are, by their pursuits, better suited to make rules; we to expound and enforce them after made." [14]

PERCY BORDWELL.

COLUMBIA, MISSOURI.

[14] (1849) 7 Howard 52.